

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>PATRICK I. WEMPE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 236,505
<b>TOPEKA WINNELSON</b>	)	
Respondent	)	
AND	)	
	)	
<b>ZURICH AMERICAN INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier appealed the April 20, 2001 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on October 23, 2001, in Topeka, Kansas.

**APPEARANCES**

Jeff K. Cooper of Topeka, Kansas, appeared on behalf of claimant. Rex W. Henoch of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

This is a claim for a December 17, 1996 accidental injury which resulted in two surgeries and permanent injury to claimant's back. In the Award, Judge Benedict found claimant was entitled to a 50.9 percent permanent partial general disability award based upon a 21.8 percent wage loss and an 80 percent task loss. Judge Benedict further found claimant's functional impairment to be 10 percent based upon the rating given by William O. Reed, Jr., M.D. After the injury, claimant eventually terminated his employment with respondent based upon what appeared to be a mutual agreement that, due to his injury, claimant could no longer perform the work and accommodated work was not available. Thereafter, claimant has worked for three different employers. Judge Benedict concluded that claimant could have continued working at the highest paying of those jobs and,

therefore, imputed the hourly wage from the job with Tenth Street Medical in arriving at claimant's wage loss. Respondent contends that when the additional compensation is included the job at Tenth Street Medical paid at least 90 percent of claimant's pre-injury average weekly wage and, therefore, claimant is not entitled to an award based on a work disability. In its Application for Review and in its brief to the Board respondent also disputed a portion of the temporary total disability award. But during oral argument to the Board respondent agreed that claimant was also entitled to temporary total disability compensation for the 5.14 week period of November 1, 1999 through December 6, 1999.<sup>1</sup>

Claimant contends Judge Benedict erred by imputing a wage because claimant made a good faith effort to find appropriate employment post-injury. Claimant also contends that the 25 percent functional impairment rating by P. Brent Koprivica, M.D., is the most credible of the two ratings. Claimant asks that the ALJ's Award otherwise be affirmed in all respects.

The nature and extent of claimant's disability is the only issue for review.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds that the April 20, 2001 Award should be modified as to claimant's percentage of functional impairment and the award calculation should be corrected to set out the variations in wage loss during the periods of employment and unemployment, but should otherwise be affirmed.

The Board adopts the findings of fact and conclusions of law of the ALJ as set forth in the Award to the extent they are not inconsistent with the findings and conclusions stated herein.

The Board agrees with the ALJ's decision to adopt the restrictions and task loss opinion of Dr. Koprivica, but considers the impairment ratings given by Dr. Koprivica and by Dr. Reed to both be credible. Therefore, the Board will average the two and find claimant's impairment of function to be 17.5 percent.

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<sup>1</sup> Judge Benedict announced at p.6 of the February 15, 2001 Regular Hearing transcript that respondent paid a total of \$4,947.33 in temporary total disability compensation representing 23.14 weeks at the rate of \$214.29 per week. In its brief, respondent represented that those payments were for the periods of May 22, 1997 through September 2, 1997, and October 22, 1999 through October 31, 1999. However, these dates total only 16 weeks. Claimant also requested, and the ALJ awarded, an additional 5.14 weeks of temporary total disability for the period of November 1, 1999 through December 6, 1999. The total temporary total disability Judge Benedict awarded was 28.28 weeks (23.14 weeks plus 5.14 weeks). However, the dates of May 22, 1997 through September 2, 1997, and October 22, 1999 through December 6, 1999, total only 21.28 weeks. The Board is unable to find any explanation for this discrepancy in the record or in the briefs. There was no request for additional periods of temporary total disability. Therefore, the Award will be corrected to award 21.28 weeks of temporary total disability compensation.

Because a back injury is an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk<sup>2</sup> and Copeland.<sup>3</sup> In Foulk, the Court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In Copeland, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>4</sup>

The question becomes whether claimant made a good faith effort to obtain employment, and specifically to retain the job with Tenth Street Medical following his release to work after the injury. If claimant failed to make a good faith effort, or unreasonably refused to perform appropriate work as in Foulk, then claimant is precluded from using his actual

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<sup>2</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>3</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>4</sup> Copeland at 320.

earnings when calculating the wage loss prong of the two-part disability formula. The test of good faith, however, is on the part of both claimant and the employer.<sup>5</sup>

Following his injury, claimant returned to work for respondent in the same position. That job continued to pay a comparable wage until March 31, 1997, when claimant's wage was reduced and he began being paid at the hourly rate of \$8.50. Because of his injuries, claimant eventually determined that he could not continue to perform his job and respondent did not offer any accommodations. Claimant's condition failed to improve and claimant underwent a second back surgery after leaving respondent. The Board finds that claimant's refusal to continue performing the work with respondent was done in good faith. A claimant may make a good faith effort and still be unable to perform even accommodated work.<sup>6</sup> A claimant may, for example, be assigned work which does not exceed medical restrictions but which is beyond the claimant's ability or causes claimant's symptoms to worsen. In spite of good faith efforts, the claimant may not perform the job adequately.

After leaving respondent, claimant eventually found other employment but the record is silent concerning claimant's post-injury job search efforts. The record only shows where claimant found employment. The Board finds claimant failed to prove that he acted in good faith in his job search efforts.

The Board cannot conclude, however, claimant did not exercise reasonable judgment or did not act in good faith in leaving the job with Tenth Street Medical. His concerns and reasons for leaving that job appear reasonable. Therefore, the Board will not impute the average weekly wage claimant was earning at Tenth Street Medical. But again, after leaving Tenth Street Medical claimant failed to show that he made a good faith job search effort. And his decision to become self employed with Dyna-Form, Inc., did not constitute good faith because claimant initially earned substantially less than he could elsewhere.<sup>7</sup> Accordingly, a wage based upon claimant's capacity to earn wages should be imputed because of the large difference between claimant's capacity to earn wages and what his actual wage has been while self employed. Not only does claimant's job at Dyna-Form pay only \$7 per hour, but he averaged less than 32 hours of work per week during 33.57 weeks he worked from May 11, 2000 through December 31, 2000.

The Board is mindful that respondent has never offered claimant accommodated work. Furthermore, claimant believed that his job at Tenth Street Medical was perhaps not

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<sup>5</sup> See Helmstetter v. Midwest Grain Products, Inc., \_\_\_ Kan.App.2d \_\_\_, 18 P.3d 987 (2001); Oliver v. The Boeing Company-Wichita, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999); Tharp v. Eaton, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

<sup>6</sup> See Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

<sup>7</sup> Cf. Edwards v. Klein Tools, Inc., 25 Kan. App. 2d 879, 974 P.2d 609 (1999); Cabrera v. Casco, Inc., 25 Kan. App. 2d 169, 959 P.2d 918 (1998); Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

going to be available much longer. Claimant testified that his days there were numbered. Tenth Street Medical had financial problems and it filed for bankruptcy sometime after he quit. Nevertheless, claimant's reasons for leaving the Tenth Street Medical job were primarily personal. He believed he had a better future working for himself and was willing to earn substantially less money in order to pursue that ambition. However understandable, respondent should not be asked to subsidize that endeavor. Therefore, the Board will impute \$9.00 an hour or \$360.00 per week as claimant's wage earning capacity. As this is less than 90 percent of his pre-injury average weekly wage, claimant is entitled to permanent partial disability compensation based upon a work disability.

However, claimant is entitled to a work disability award based upon his actual post-injury wages while he was still working for respondent after his injury and while he was working for the other two subsequent employers, Medical Industries American, Inc., and Tenth Street Medical, but only when those jobs paid less than 90 percent of his average weekly wage. His wage loss, therefore, should be calculated as follows:

12/17/96 - 03/31/97 ----- 0 percent wage loss.

Claimant continued to work for respondent and earned at least 90 percent of his pre-injury average weekly wage. Permanent partial disability compensation is limited to the percentage of functional impairment.

04/01/97 - 05/22/97 ----- 21 percent wage loss.

Claimant earned \$8.50 per hour plus \$24.92 per week in additional compensation (health insurance) for an average weekly wage of \$364.92.

05/23/97 - 09/02/97 ----- 0 percent wage loss.

Received temporary total disability compensation, so not entitled to permanent partial disability compensation.

09/03/97 - 12/31/97 ----- 22 percent wage loss.

Claimant was unemployed but failed to prove good faith job search so a wage of \$9.00 per hour or \$360.00 per week is imputed.

For 1998 -

The actual dates claimant was employed are not in evidence. The record indicates claimant worked 3 months for Medical Industries American, Inc., and 6 months for Tenth Street Medical. Using these dates, the Board finds claimant was unemployed 3 months. For purposes of the award calculation, the Board will treat the periods of employment sequentially after the period of unemployment.

01/01/98 - 03/31/98 ----- 22 percent wage loss based upon a \$360.00 imputed weekly wage.

Claimant was unemployed and failed to prove a good faith job search.

04/01/98 - 06/30/98 ----- 11 percent wage loss.

Claimant earned a total of \$5,325.00 working an estimated 3 months for Medical Industries American, Inc. ( $\$5,325.00 \div 13 \text{ weeks} = \$409.62 \text{ per week}$ ).

07/01/98 - 12/31/98 ----- 0 percent wage loss.

Claimant earned a total of \$11,070.91 during the estimated 6 months he worked for Tenth Street Medical during 1998 which is more than 90 percent of his pre-injury average weekly wage.

01/01/99 - 03/31/99 ----- 0 percent wage loss.

Claimant continued to work for Tenth Street Medical earning at least 90 percent of his pre-injury average weekly wage.

04/01/99 - 10/21/99 ----- 22 percent wage loss based upon imputed  
wage earning ability of \$360.00 per week.

Claimant was unemployed and failed to prove a good faith job search.

10/22/99 - 12/06/99 ----- 0 percent wage loss.

Claimant received temporary total disability compensation.

12/07/99 - 05/10/00 ----- 22 percent wage loss based upon imputed  
wage earning ability of \$360.00 per week.

Claimant was unemployed and failed to prove a good faith job search.

05/11/00 - present ----- 22 percent wage loss based upon an imputed  
wage of \$360.00 per week.

Claimant was employed by Dyna-Form, Inc., with an actual wage that averaged \$217.90 per week during 1999.

As required by K.S.A. 44-510e(a), the Board will give equal weight to the 80 percent task loss opinion given by Dr. Koprivica and the claimant's above wage losses to find claimant's percentages of work disability from the date of accident to the present date. As provided by the Act, this award is subject to review and modification should claimant's income or other circumstances change.<sup>8</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict, dated April 20, 2001, should be, and is hereby, modified as follows:

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<sup>8</sup> K.S.A. 44-528.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Patrick I. Wempe, and against the respondent, Topeka Winnelson, and its insurance carrier, Zurich American Insurance Company, for an accidental injury which occurred December 17, 1996, and based on an average weekly wage of \$460.38, 21.28 weeks of temporary total disability compensation at the rate of \$306.94 or \$6,531.68 and 208.45 weeks of permanent partial disability compensation at the rate of \$306.94 for a total of \$63,981.64. Claimant is entitled to benefits as follows:

for the period of 12/17/96 through 03/31/97 - 14.86 weeks of permanent partial disability compensation totaling \$4,561.13 based upon a 17.5% impairment of function;

for the period of 04/01/97 through 05/22/97 - 7.43 weeks of permanent partial disability compensation totaling \$2,280.56 based upon a 21% wage loss and an 80% task loss for a 50.5% work disability;

for the period of 05/23/97 through 09/02/97 - 14.71 weeks of temporary total disability compensation totaling \$4,515.09;

for the period of 09/03/97 through 12/31/97 - 17.14 weeks of permanent partial disability compensation totaling \$5,260.95 based upon a 22% wage loss and an 80% task loss for a 51% work disability;

for the period of 01/01/98 through 03/31/98 - 12.86 weeks of permanent partial disability compensation totaling \$3,947.25 based upon a 22% wage loss and an 80% task loss for a 51% work disability;

for the period of 04/01/98 through 06/30/98 - 13 weeks of permanent partial disability compensation totaling \$3,990.22 based upon an 11% wage loss and an 80% task loss for a 45.5% work disability;

for the period of 07/01/98 through 12/31/98 - 26.29 weeks of permanent partial disability compensation totaling \$8,069.45 based upon a 17.5% impairment of function;

for the period of 01/01/99 through 03/31/99 - 12.86 weeks of permanent partial disability compensation totaling \$3,947.25 based upon a 17.5% impairment of function;

for the period of 04/01/99 through 10/21/99 - 29.14 weeks of permanent partial disability compensation totaling \$8,944.23 based upon a 22% wage loss and an 80% task loss for a 51% work disability;

for the period of 10/22/99 through 12/06/99 - 6.57 weeks of temporary total disability compensation totaling \$2,016.60;

for the period of 12/07/99 through 05/10/00 - 22.29 weeks of permanent partial disability compensation totaling \$6,841.69 based upon a 22% wage loss and an 80% task loss for a 51% work disability;

for the period of 05/11/00 through present - 52.58 weeks of permanent partial disability compensation totaling \$16,138.91 based upon a 22% wage loss and an 80% task loss for a 51% work disability.<sup>9</sup>

Total compensation in the amount of \$70,513.32, which is all due and owing, is ordered paid in one lump sum less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Rex W. Henoch, Attorney for Respondent  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director

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<sup>9</sup> This award would fully pay out on May 14, 2001. Generally, whenever there is no gap in disability benefits, the total disability compensation award is the same as if the award were calculated using only the last percentage of permanent impairment. That is the case here. There would be no difference in compensation had this award been calculated as being for 21.28 weeks of temporary total disability followed by a 51% work disability. Because of this, the Board sometimes will only show the abbreviated calculation, but with an explanation that although the percentage of disability changed it makes no difference in the award. However, this has been misinterpreted by some and caused them to believe that the Board is holding that only the last disability percentage matters and will control or supercede all prior periods of disability. To avoid such confusion, the Board has included the entire calculation in this award with each separate period of disability specifically set out and explained.